Nos. 332 and 333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

No. 333

UNION PACIFIC RAILROAD COMPANY, ET AL.,
Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

On Appeal from the United States District Court for the District of Colorado

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BRIEF OF THE AMERICAN SHORT LINE RAILROAD ASSOCIATION IN OPPOSITION TO MOTION TO REVERSE

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STATEMENT

The American Short Line Railroad Association, hereinafter referred to as the Association, intervened in support of The Denver and Rio Grande Western Railroad, complainant before the Interstate Commerce Commission in Docket No. 30297, *Denver and Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, Et Al.*,

the administrative proceeding giving rise to this litigation. The Association also intervened in support of the Rio Grande in the judicial review proceedings in the U. S. District Court for the District of Colorado,[1] from which decision appeals have been taken by the Union Pacific and certain state commissions in Nos. 332 and 333, in the October Term, 1955 of this Court.

The Association is a voluntary, unincorporated association with a membership of 301 common carriers by railroad, of which all but three (3) are engaged in interstate and foreign commerce and therefore subject to the Interstate Commerce Act and related acts, and to the jurisdiction of the Interstate Commerce Commission. The Association, its members in general, and many of its members in particular, are vitally interested in the issues involved in these appeals with respect to the existence or establishment of through routes and rates, and fair and reasonable divisions of revenues, with particular reference to the establishment and maintenance of competitive joint through rates. The questions presented in these appeals are substantial and of public importance, and their determination will have a vital effect on the affairs of practically all of the members of this Association.

ARGUMENT

There is a serious question as to the propriety of the filing of appellants' so-called "Motion to Reverse." Certainly it cannot be said that the Revised Rules of this Court authorize the filing of such a pleading, and appellants do not so contend. They apparently seek to justify their action by reference to procedures set forth in Rule 16, providing for the filing of a Motion to Dismiss or Affirm. Such motions are available to an appellee in appeals of this type,

[1] *The Denver and Rio Grande Western Railroad Company* v. *United States, Et Al.*, Civil Action No. 4492.

to serve as a response to a Jurisdictional Statement, but the Rules do not provide for a Motion to Reverse. The Revised Rules have not been understood to permit multiple pleadings by an appellant. The fact that this Court on its own motion may summarily affirm a decision of a lower court does not suggest that an appellant may move for summary reversal.

It is conceivable that appellants' multiple pleadings will rebound to their disadvantage. Clearly it is paradoxical for the appellants in their separate Jurisdictional Statements to urge this Court to take jurisdiction and resolve the substantial questions presented in their appeals, and then suggest that the Court need not avail itself of the record nor the assistance of briefs and arguments by the parties.

Inasmuch as, as we show below, appellants' arguments failed to convince either the lower court or a majority of the Commission it is perhaps unnecessary to belabor the question of proper procedure.

1. Issues as to Through Routes

The principal interest of the Association in these appeals is centered on the proper interpretation and application of the Interstate Commerce Act and decisions of this Court as concerns the question of the existence of through routes. All of the members of this Association are participants in countless through routes and joint rates. The decisions of two District Courts on appeal to this Court in Numbers 332, 333, 117 and 118 (as well as in 334 and 119) being in conflict with each other on questions of law which the Commission in part could not, or at least did not itself decide, attest to the complexity of the questions presented. A decision resolving all appeals requires re-examination and clarifying expression of the appropriate criteria to be used

by the Commission and courts in determining the existence or non-existence of through routes.[2]

Sufficient details are available in the pleadings now filed in these cases to briefly state the elements of the key issue requiring decision by this Court.

In the initial phase of its report the Commission unequivocally states that the first question it had to decide was whether there were, as claimed by the Rio Grande, existing through routes. Its report shows that five of the ten voting Commissioners found that through routes *did* exist.

It is clear, therefore, that there was support for the lower court's conclusion that the Commission by proceeding to decide the case on the basis that there were no existing through routes "obviously prejudiced the entire proceeding." (Jur. State., No. 333, App. D, p. 11.)

Noting the equal division within the Commission, the lower court properly proceeded to determine that question, and found that "the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence."

It is significant to note at this point that the report of the Commission and the lower court's decision show that the court's decision, and that of each of the conflicting groups within the Commission, were based on conclusions reached after their respective analyses and interpretations of this Court's opinions in the *Thompson*[3] and related cases.

Although appellants contend that the lower court's decision is "vague and lacking in specificity as to the precise

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[2] The Government in No. 334 describes the "Question Presented" as follows:

> "Whether the district court, in setting aside the Commission's order establishing new through routes (and joint rates) on the ground that the 'uncontradicted evidence' showed that through routes were already in existence, applied an erroneous standard for determining the existence of a through route." (Jur. State. No. 334, p. 4)

[3] *Thompson V. United States*, 343 U.S. 549 (1952).

reason why it holds that through routes are in existence," we suggest that a fair reading of the opinion shows why appellants' earlier similar arguments have not been persuasive to the Court or to a majority of the Commission.

To supply some of the findings not commented upon by the appellants, we observe that the district court noted that the principal traffic witness of the Union Pacific testified before the Commission "that a shipper who was willing to pay the higher combination rate had the right to specify under 15(8) of the Act a route via the Rio Grande," and that "It should be observed that this right exists only when through routes and through rates have been established." (Jur. State. No. 333, App. D, p. 12.)

Neither did appellants refer to the fact that Union Pacific counsel expressed the opinion at the hearing before the Commission, in response to interrogation by Commissioner Alldredge, that the cancellation of joint rates did not close the through routes admittedly long before established, and that shippers were free to route via the Rio Grande if they were willing to "pay the price" of higher rates.

With reference to the finding in the *Thompson* case, that there was no evidence in that case that "any *through transportation service* has ever been offered from Lenora to Omaha via the Burlington" (emphasis supplied) on any commodity, the court below found that the record here disclosed that there was a representative movement of a variety of commodities in *through transportation service* via the Rio Grande over the routes involved, despite the higher combination rates charged. The court found that admittedly *through transportation service* has been continuous on sheep and goats; and at through rates published *jointly* by the Union Pacific and the Rio Grande. It is submitted that if these facts had been established in the *Thompson* case, the Court would have held otherwise on the through routes issue.

It is clear that the lower court also refused to support the Commission's holding that a "commercially closed through route" is not a "through route." The decisions of this Court in *Thompson* and *Great Northern*[1] cases, and earlier cases therein referred to, completely refute the validity of the Commission's holding in this regard.

In summary, the Association urges that due recognition of this Court's past decisions does not sustain the view that routes are only through routes when there is a joint rate published by the carriers involved. On the contrary, in the *Great Northern* case, *supra*, at page 572, this Court said: "The Interstate Commerce Act contemplates the existence of through routes in the absence of joint rates." It is again urged that the existence of published joint through rates applicable to the routes involved—consistently recognized by the Union Pacific for the transportation of sheep and goats, coupled with the issuance of through bills of lading on other commodities even though the rates were higher, clearly proves that there are existing through routes. The only real issue in the case before the Commission was whether such routes should be made commercially available to shippers of other commodities by the establishment of competitive joint through rates.

2. Scope of Judicial Review

It is believed unnecessary to comment in detail on other points mentioned in appellants' motion. Its first point, raising the technical question whether there was a Commission order susceptible of the scope of review given by the lower court, is answered by the fact that the order *in terms* refers to and incorporates the Commission's report containing its findings of fact and conclusions. (Jur. State. No. 333, App. C, p.).

Equally devoid of substance is the contention that the Rio Grande lacks standing to maintain this action. Even

[1] *United States* v. *Great Northern*, 343 U.S. 562 (1952).

in the absence of the record it is evident that the only relief the Rio Grande sought in its complaint to the Commission was the establishment of reasonable competitive joint through rates, and it must be admitted this relief can only be obtained by primary resort to the Commission. It is equally clear that the Judicial Code gave the Rio Grande the right to obtain judicial review of a decision substantially denying that relief. (28 U.S.C. 1253, 1336, 2101(b); and 2321-2325.)

CONCLUSION

It is submitted that the foregoing comments clearly disclose the lack of merit, independent of the propriety, of appellants' Motion to Reverse, and require its denial by this Court. Determination of the issues presented by the appeals are of paramount importance to the general public, the railroad industry, and members of this Association. It is suggested that the Court may wish to accept the more judicious appraisal of the substance of the issues given in the Jurisdictional Statement of the Government appellants in Number 334, that:

> "The questions presented by this appeal are substantial and of public importance. There is also a serious conflict of decisions. It is respectfully submitted that probable jurisdiction should be noted, and it is further suggested that this case should be consolidated for argument in Nos. 117-119."[5]

Respectfully submitted,

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[5] As a footnote to this conclusion Government appellants stated—
"The two cases are interdependent, since the Court will not reach the issues in Nos. 117-119 if it affirms the judgment in this case."